exemption to include federal law enforcement officers, private law enforcement officers, and even law enforcement officers employed on a part-time basis, is in flagrant contravention of the Sixth Amendment.

I. The Decision Below Conflicts with Controlling Precedent of this Court.

The American concept of trial by jury contemplates a jury drawn from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). The selection of a petit jury from a representative cross section of the community "is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528. The fair cross section requirement assures "that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." *Holland v. Illinois*, 493 U.S. 474, 481 (1990). The petit jury actually chosen need not "mirror the community" but the pool from which it is drawn "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana*, 419 U.S. at 538.

This Court has declared that the purpose of a jury "is to guard against the exercise of arbitrary power–to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Id.* at 530. *See also Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). The prophylactic function served by juries does not work if the jury pool is comprised of only certain segments of the population or if distinctive groups are excluded from the jury pool. *Taylor v. Louisiana*, 419 U.S. at 530. The fair section requirement is premised on the belief that juries comprised of only special segments of society would be less able to make "the

commonsense judgments of the community." *Id.* Furthermore, excluding from jury service groups that play a vital role in society is inconsistent with our "democratic heritage" and promotes lack of confidence in the criminal justice system. *Id.*

The Middle District of Florida adopted the provisions of the Act in their entirety in its Plan for the Qualification and Random Selection of Grand and Petit Jurors ("Jury Plan"). (App. 54a). The Juror Questionnaire Form employed by the Middle District goes a step further and exempts federal law enforcement officers, a group that neither the Jury Plan nor Section 1863(b)(6) exempts. (App. 77a). It was undisputed in this case that the pattern and practice in the Middle District of Florida is to exempt from jury service anyone with arrest powers, including part-time law enforcement officers and even those employed in the private sector. (App. 37a).

The Eleventh Circuit Court of Appeals rejected Petitioner's claim that the Act, as implemented and expanded upon the Jury Plan and then further broadened by the practices and policies of the Middle District of Florida, directly contravened this Court's decisions in *Taylor v. Louisiana* and *Duren v. Missouri*, 439 U.S. 357 (1979). (App. 21a-22a). The Court of Appeals made no effort to distinguish this Court's precedent but ignored it altogether in announcing that the exemption of law enforcement officers from juries was justified because it allowed the officers "to perform their duties without interruption of jury service." (App. 21a). *Taylor* and *Duren* expressly prohibit the practice employed by the Middle District and soundly reject the reasoning relied upon by the Court of Appeals.

In *Duren*, this Court examined a Missouri statute under which women were automatically exempted from jury duty if they requested such an exemption. The Court observed that "exempting all women because of the preclusive domestic

responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires." 439 U.S. at 369. Quoting from its earlier decision in *Taylor v. Louisiana*, 419 U.S. at 534-35, the Court explained:

> It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.

439 U.S. at 369. The Court recognized the important state interest in assuring that members of families responsible for the care of children are not inhibited in this endeavor. Nonetheless, the Court warned that states must exercise caution in "exempting broad categories of persons from jury service." *Id.* at 370.

Although *Taylor* and *Duren* involved the exclusion of women from jury service, the reasoning of the Court in those cases applies equally well to the class of persons excluded from jury service in Petitioner's case–all law enforcement officers. Such an expansive exemption cannot be sustained in light of this Court's precedent.

II. The Policy of Excluding Police Officers from Jury Service is Not Justified in Today's Society.

The standard for determining whether the Sixth Amendment fair cross section requirement has been violated was established by this Court in *Duren v. Missouri*, 439 U.S. at 364:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representations of this group in venires from which juries are selected is not fair and reasonable in relationship to the number of such persons in the community and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State and local police officers are a "'distinctive' group in the community" simply by virtue of the Act's exemption of this entire class of individuals from jury service. As the First Circuit Court of Appeals observed in *Anaya v. Hansen*, 781 F.2d 1, 4 (1st Cir. 1986), "If certain people are specifically and systematically excluded from jury duty, then the jury-administering authority would have created its own group."

Representation of this singled-out group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; obviously, no matter how many police officers there may be in the community, the number in the jury venires will always be zero. Finally, there is not mere "underrepresentation" or a statistical imbalance of police officers in jury venires relative to the population. Rather, the cause of the lack of representation is systematic, that is, it is inherent in the jury selection process utilized by the Middle District.

Acknowledging that at least 0.55% of the estimated juror pool in the Fort Myers Division of the Middle District is exempt as law enforcement officers, the Eleventh Circuit Court of Appeals held that, even assuming Petitioner had established a prima facie Sixth Amendment violation, "a significant state interest is manifestly and primarily advanced" by the exemption of all law enforcement, to wit, "allowing police officers to perform their duties without the interruption of jury service[.]" (App. 21a).

In so holding, the Court of Appeals relied on an earlier Eleventh Circuit decision, *United States v. Terry*, 60 F.3d 1541 (11th Cir. 1995), *cert. denied*, 516 U.S. 1060 (1996), apparently the only decision in the country on point, in which the court opined that "exempting certain occupational groups from jury service because it is good for the community that they not be interrupted in their work does not violate the United States Constitution." *Id.* at 1544. To support its holding that exempting police officers from jury service did not run afoul of the fair cross-section requirement of the Sixth Amendment, the *Terry* court relied almost exclusively on the century-old case of *Rawlins v. Georgia*, 201 U.S. 638 (1906), in which this Court upheld, on due process grounds, the automatic exclusion from a grand jury in a murder case of lawyers, ministers, doctors, dentists, railway engineers and firemen. *Id.* at 561. Significant to the Court was that it did not "even appear that any of the defendants belonged to any of the excluded classes." *Id.* at 560.

The flaws in the Court of Appeals's reliance on *Terry*, which, in turn, relied on *Rawlins*, are many. First, it is well established today that a defendant need not be a member of the excluded class to object that the exclusion of that class of individuals deprived him of the kind of factfinder to which he is constitutionally entitled. *Taylor v. Louisiana*, 419 U.S. at

526. Second, *Rawlins* involved a due process claim; the Sixth Amendment fair cross-section requirement was neither raised by the parties nor addressed by the Court. 201 U.S. at 561. Third, there was no automatic, systematic exemption in *Rawlins*, as in Petitioner's case, but, rather, the jury commissioners had failed to put the names of any members of the specified professions in the box from which names were selected so they were not drawn for jury service. *Id.* at 560.

In any event, contrary to the decision of the Eleventh Circuit in this case, the government failed to rebut Petitioner's prima facie showing of a Sixth Amendment violation. To rebut the showing of a prima facie case, the government must demonstrate "a significant state interest" that is "manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of distinctive group." *Duren v. Missouri*, 439 U.S. at 368. *See also Taylor v. Louisiana*, 419 U.S. at 533-35. It cannot reasonably be said that the exclusion of law enforcement officers from grand and petit juries is "critical to the community's welfare." The Act's automatic exemption of state and local police officers was a product of a different era. In today's world, with the highly sophisticated networks of communication and travel and the ever expanding law enforcement organizations, it is untenable to suggest that society can never spare a law enforcement officer for jury duty. The mandatory exemption set forth in the Act simply makes no sense in modern times.

Moreover, there is no basis for automatically exempting police officers lest their important function be interrupted, but not extending such exemptions to emergency room physicians, air traffic controllers and any number of other professionals integral to the orderly daily functioning of society. As this Court observed in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), in

the context of exercising peremptory challenges to keep women off juries:

> Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of the jury trial. The diverse and representative character of the jury must be maintained 'partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'

Id. at 142, *quoting Taylor v. Louisiana*, 419 U.S. at 522, 530-31 (citations omitted).

The Sixth Amendment's requirement that juries be chosen from a fair cross-section of the community "is fundamental to the American system of justice." *Taylor v. Louisiana*, 419 U.S. at 529. The mandatory, systematic exemption of all law enforcement officers from jury service "'contravenes the very idea of a jury–'a body truly representative of the community." *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (exclusion of all black persons from jury service violates Sixth Amendment), *quoting Smith v. Texas*, 311 U.S. 128, 130 (1940).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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October 6, 2005

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11545

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WYATT HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

FILED
May 23, 2005
THOMAS K. KAHN
CLERK

Before BARKETT, HILL and FARRIS*, Circuit Judges.

BARKETT, Circuit Judge:

Wyatt Henderson appeals his conviction and sentence after a jury trial for: (1) use of excessive force under color of law in violation of 18 U.S.C. § 242; (2) submitting a misleading and

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

incomplete report of the incident to his supervisor with the intent to hinder, delay, or prevent the communication of information to a law enforcement officer relating to the commission of a federal offense in violation of 18 U.S.C. § 1512(b)(3); and (3) providing a false statement of material fact to an FBI agent in violation of 18 U.S.C. § 1001.

The charges against Henderson stem from accusations that he unlawfully pistol-whipped an arrestee, Christopher Grant, while a corporal with the Charlotte County, Florida, Sheriff's Department and then falsified the report of the incident. On appeal, Henderson asserts that the district court made various evidentiary errors that entitle him to a new trial, erroneously excluded police officers from jury selection in violation of his Sixth Amendment right to a grand and petit jury selected from a group representing a fair cross-section of the community, and erred in sentencing him to 87 months imprisonment.

I. BACKGROUND

Christopher Grant had been targeted by the Charlotte County Sheriff's Department's Vice and Organized Crime Component (VOCC) for selling marijuana. VOCC officers set up an undercover sting operation to arrest Grant, attempting to apprehend him in a parking lot. However, Grant fled the area in his minivan before officers could detain him.

Henderson, who had been stationed in an unmarked car within view of the parking lot, pursued and stopped Grant on the side of the road. Stopping his car almost parallel to Grant's van, Henderson pointed his service weapon at Grant and ordered him out of his car and onto his knees with his hands in view. Grant testified that he complied, exiting the car and kneeling on the ground with his hands on his head.[1] Detective

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[1] Henderson testified that he ordered Grant to lie down and that Grant refused to comply.

Keith Bennett, who had arrived at the scene shortly after Henderson, testified that Henderson approached Grant with his gun still in his right hand, placed a knee on Grant's back and using his substantial weight advantage, "rode him to the ground." On the way down, Grant's chin struck the pavement.[2] At this time, Grant testified that he saw a "black object" coming towards his head, and was forcefully struck in the jaw with a force he compared to that of a "mack truck." Detective Bennett corroborated this testimony, stating that once Grant was prone and offering no resistance, he saw Henderson's gun arm move to strike Grant. In contrast, Henderson testified that he put his gun in his car before approaching Grant because *1297 he was not wearing a holster and did not want to physically confront Grant with a loose weapon. The defense also introduced evidence asserting that any injuries Grant suffered were the result of this initial impact with the pavement.

After the incident, both at the scene of the arrest and back at the police station, detectives testified that Henderson made incriminating statements to the effect that he had in fact struck Grant with his pistol. Notably, Detectives Bennett and Jack Collins stated that when informed that he was to write a report about what happened at the scene, Henderson threw a cellular telephone across the room and replied, "Jesus Christ, you can't pistol-whip anybody any more," or something to that effect, and said that he needed to wipe DNA off of his gun.

Detectives Bennett and Collins further testified that Henderson told other VOCC officers--his subordinates--not to include details of the arrest in their own police reports. Detective Bennett also testified that Henderson told him to

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[2] The parties agree that this initial take-down was lawful, and that any injury that Grant suffered from his contact with the pavement does not form the basis of the charges against Henderson.

deny that he had struck Grant. Allegedly fearing retaliation by Henderson, his boss, Bennett omitted any statement about a pistol-whipping. Bennett also testified that Henderson was very angry when he discovered Bennett was filing a supplemental report about the incident, and accused him of betrayal. Ultimately, one detective submitted a report directly to Henderson's supervisor stating that Grant questioned officers after his arrest about being pistol-whipped.

Henderson's report, on the other hand, stated that "no force" had been used in the arrest, and made no mention of striking Grant. In a subsequent interview with an FBI agent investigating Grant's allegations of excessive force, Henderson represented that he had thrown his gun into his car before approaching Grant, forming the basis of the charge that Henderson made a false statement "material" to the investigation.

Henderson's arguments on appeal relate to evidentiary rulings, jury selection and sentencing and we address each in turn.

II. EVIDENTIARY ISSUES

We review evidentiary rulings for an abuse of discretion. *Morro v. City of Birmingham*, 117 F.3d 508, 513 (11th Cir.1997), *cert. denied*, 523 U.S. 1020, 118 S.Ct. 1299, 140 L.Ed.2d 465 (1998). However, basing an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion *per se*. *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1232 (11th Cir.2004).

Henderson argues that six evidentiary rulings entitle him to a reversal of his conviction: (1) excluding evidence of a domestic dispute involving Detective Collins, a witness for the government, which, Henderson asserts, would have shown Collins' bias against him; (2) permitting Collins to testify that

he found Grant's version of the incident to be credible; (3) admitting the opinion of Grant's oral surgeon as to the cause of his facial injuries, when the government failed to give timely notice designating her as an expert witness; (4) excluding polygraph evidence favorable to Henderson; (5) excluding testimony by an expert on police procedure offered by Henderson; and (6) admitting evidence that the sheriff who had originally hired Henderson had been removed for misconduct. He also claims that even if these errors, viewed separately, were harmless, their cumulative effect was not, and entitles him to a new trial.

1. Bias Evidence Concerning Detective Collins

At trial, Henderson sought to show that Collins was biased against him because Henderson had transferred Collins *1298 from the VOCC to an undesirable traffic assignment. The court admitted evidence offered by Henderson, through the testimony of another officer, that Collins was transferred in part because he had been leaking proprietary VOCC information to his former supervisors. Henderson's counsel then asked the officer if there were additional reasons for Collins' transfer. The district court sustained the objection to the question and Henderson argues that this constitutes reversible error.

The government argues, as a threshold issue, that we may only review Henderson's objection to the exclusion of this "bias" evidence for plain error because Henderson never made an offer of proof to the trial court about what the excluded evidence would have shown. *Collins v. Wayne Corp.*, 621 F.2d 777, 781 (5th Cir.1980).[3] Under Federal Rule of Evidence

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

103(a)(2), the objecting party must make an offer of proof to the court, or else show that the substance of the excluded evidence was apparent from the context of the proceeding, to preserve an objection to a ruling excluding evidence. Fed.R.Evid. 103(a)(2); *United States v. Quinn*, 123 F.3d 1415, 1420 (11th Cir.1997). Here, the government notes, there is no indication that the district court knew the nature of the evidence since Henderson did not identify it until a post-trial motion and his initial appellate brief. After trial, Henderson claimed that he wanted to present evidence that Collins was also dismissed because he had engaged in a domestic dispute with his wife that involved his service weapon. He argues that he could not have made an offer of proof at trial because the district judge did not permit bench conferences, requiring parties to reserve issues they did not wish to discuss before the jury to a time when the jurors were not required to be present in court. Moreover, he indicates that the district judge also forbade "speaking objections," where the objecting party explains the basis for its objection, allowing the objecting party to voice only a very abbreviated basis for its complaint.

The record contains no evidence that Henderson made any effort to advise the court at any time during trial of the nature of the evidence sought to be elicited, something that Henderson's counsel also admitted at oral argument. But, in any event, exclusion of this bias evidence was not an abuse of discretion even under a preserved error standard. Federal Rule of Evidence 403 allows a judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. Even if relevant, the excluded bias evidence posed a danger of unfair prejudice that substantially outweighed any probative value it contained. Henderson had already admitted bias evidence

regarding Collins' transfer, making this evidence less probative of bias and somewhat cumulative. Moreover, evidence about Collins' domestic dispute posed a disproportionate risk of unfairly inflaming the jury's emotions and sidetracking the trial regarding the irrelevant question of whether or not Collins engaged in spousal abuse. *See United States v. Hands*, 184 F.3d 1322, 1328 (11th Cir.1999) (stating that impeachment evidence of violent spousal abuse is "particularly likely to incite a jury to an irrational decision" and excluding it under Rule 403) (internal quotation marks and citation omitted).

2. Detective Collins' Statement that He Found Grant's Account Credible

On direct examination, Collins testified about his initial reports regarding Grant's arrest and stated that he initially thought Grant's injury occurred when his chin hit the ground. He also testified to Henderson's multiple, incriminating comments in the days after the arrest, including Henderson's statement that "you can't pistol-whip anybody any more." On cross-examination by Henderson's counsel, Collins was asked if he considered Henderson's explanation that Grant was injured as part of the take-down during arrest to be credible at the time he prepared his report of the incident. Collins responded affirmatively. On redirect, when the government explored Collins' initial views about the incident, Collins explained that he initially believed Henderson because many arrestees claim that they have been harmed by an officer. When asked whether, notwithstanding his initial views, there came a time when he found Grant's claim to be credible, Collins also answered affirmatively. Henderson argues that because a determination of witness credibility is the sole province of the jury, this testimony rendered his trial fundamentally unfair in violation of his due process rights.

The Federal Rules of Evidence preclude a witness from testifying as to the credibility of another witness. Rule 608(a) restricts a party from attacking or supporting a witness' credibility save through evidence "refer [ring] only to character for truthfulness or untruthfulness." Fed.R.Evid. 608(a). *See also Snowden v. Singletary*, 135 F.3d 732, 739 (11th Cir.1998) ("Witness credibility is the sole province of the jury.").

However, in this case, the government was not attempting to substitute Detective Collins' judgment about Grant's credibility for the jury's through the contested testimony. Rather, it sought to respond to questions on cross-examination that attempted to discredit Collins because, even though Grant told Collins at the scene of the arrest that someone had hit him with a pistol, Collins did not note Grant's accusations on police reports he compiled and filed shortly after the arrest. Henderson's cross-examination elicited Collins' testimony that Henderson's account of what happened at the scene seemed credible to Collins at the time and Grant's accusations did not sound believable. On redirect, the government sought to establish why Collins had changed his mind, eliciting Collins' explanation that although he did not believe Grant at first, he came to believe him later because of Henderson's behavior in the days after the arrest. It was only after observing Henderson's behavior and comments in the days following the incident that Collins felt that Grant might be telling the truth, and therefore decided to take action. The testimony that Collins found Grant's story to be credible was not offered to prove Grant's or Henderson's truthfulness as witnesses; instead, it explained why Collins waited to report Henderson's potential misconduct.

Although such testimony might be improper if the government had attempted to use this line of questioning as an indirect way of bolstering Grant's credibility or attacking that of Henderson, *cf. United States v. Samara*, 643 F.2d 701, 705

(10th Cir.1981), that is not the case here. The district court did not abuse its discretion by permitting Collins' testimony.

3. Testimony of Dr. Patricia Scott, Oral Surgeon

To establish that Grant sustained additional injuries to his jaw from the alleged pistol-whipping, the government offered the testimony of an oral surgeon, Dr. Patricia Scott. The government initially *1300 planned to offer Dr. Scott as an expert witness, but failed to provide proper notice pursuant to a pretrial scheduling order, and offered her as a fact witness instead. Dr. Scott was an oral surgeon and Grant's treating physician who had examined him after the arrest. She testified that Grant's jaw had a hairline fracture and, over Henderson's objection, opined that it resulted from a blow to the left side of his face. Henderson argues that this testimony offered an impermissible lay opinion pursuant to Fed.R.Evid. 701.

Non-expert (or lay) witnesses may only testify to opinions or inferences "which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed.R.Evid. 701. Subsection (c) was added in 2000, in an attempt to rein in the admission of expert testimony under the guise of lay opinion. Fed.R.Evid. 701, Advisory Committee's note to 2000 amendment (noting that the amendment was aimed at "eliminat[ing] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.").

In this case, it is certainly arguable that although Dr. Scott was the treating physician, her opinion regarding the cause of Grant's injuries was not helpful to a clear understanding of her decision making process, nor did it pertain to Grant's treatment. *See Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir.1999) ("A

treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party."); *Weese v. Schukman*, 98 F.3d 542, 550 (10th Cir.1996) (commenting that doctor's lay opinions "were based on his experience as a physician and were clearly helpful to an understanding of his decision making process in the situation."). Dr. Scott did not need to determine how Grant was injured to treat him in this case. Her diagnosis of the injury itself, that Grant's jaw was fractured, would be permissible lay testimony, but her statement about the cause of the injury was, as she admitted, a "hypothesis." And the ability to answer hypothetical questions is "[t]he essential difference" between expert and lay witnesses. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1202 n. 16 (3d Cir.1995) (quoting *Teen-Ed Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 404 (3d Cir.1980)); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

However, assuming that the admission of this statement was error, we apply the harmless error standard to erroneous evidentiary rulings. 28 U.S.C. § 2111 (2005); Fed.R.Evid. 103(a); Fed.R.Crim.P. 52(a), *United States v. Frazier*, 387 F.3d 1244, 1266 n. 20 (11th Cir.2004) (*en banc*). When a trial judge has erroneously admitted evidence in a criminal prosecution, we ask whether the error "[had] a substantial influence on the outcome of a case or [left] grave doubt as to whether they affected the outcome of a case." *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 764- 65, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)) (internal quotation marks omitted).

Because we do not harbor a grave doubt that the jury would have changed its verdict on any of the three charges had it not heard Dr. Scott's statement, we find any error harmless. The statement at issue was not integral to the prosecution's

case, as the government offered significant non-medical testimony from other witnesses supporting the conclusion that any such injury was indeed caused by unlawful use of force. *See Hands*, 184 F.3d at 1331-33 *1301 (holding evidentiary error prejudicial when the government's case rested in significant part on the inadmissible evidence). It received no mention in the opening statement, and an oblique reference at worst during closing argument. *See id.* at 1332 (prosecution's use of improper evidence in closing argument can exacerbate potential prejudice caused by its unlawful admission); *United States v. Beale*, 921 F.2d 1412, 1432 n. 18 (11th Cir.1991). The defense also countered this statement with expert testimony from a well-credentialed forensic pathologist. *Cf. United States v. Lankford*, 955 F.2d 1545, 1552-53 (11th Cir.1992) (finding that defense's inability to rebut prosecution's expert testimony relevant in holding exclusion of defense's own expert testimony not harmless).

More important by far was Dr. Scott's unobjected-to testimony that the left side of Grant's jaw indeed suffered a fracture. The fact that Grant was injured on the left side of his jaw, and not the doctor's speculation as to how it occurred, was the critical point in the government's case because the government introduced significant evidence linking any injury in that area of Grant's body to unlawful use of force by Henderson. In fact, the prosecution need not even have proved that Grant's jaw was fractured in order to secure Henderson's conviction; it only had to prove that Henderson's alleged strike injured Grant in some way. In particular, evidence of Grant's injury combined with Detective Bennett's eyewitness account of seeing Henderson strike Grant with a black object in his hand and Detective Bennett's and Collins' testimony about Henderson's subsequent statements, would have been sufficient in and of itself to support a guilty verdict for unlawful use of force. *See Frazier*, 387 F.3d at 1266-67 (*en banc*)(noting that

presence of other substantial evidence regarding the defendant's guilt supported finding of harmless error).[4] Also, the prosecution raised enough questions about Henderson's own account of Grant's arrest that a jury could reasonably have disbelieved his story of what happened. *Cf. United States v. Bennett*, 848 F.2d 1134, 1139 (11th Cir.1988) ("[A] defendant's implausible explanation may constitute positive evidence in support of a jury verdict."). For the foregoing reasons, we find no reversible error.

4. Exclusion of Henderson's Polygraph Evidence

Before trial, Henderson made a motion in limine to admit the results of two polygraph examinations, one performed at the request of the FBI and another performed by a private examiner at Henderson's request. Both tests returned inconclusive results after an initial battery of questions, and indicated that Henderson responded truthfully to a second round of questioning. A magistrate judge recommended that the district court deny the motion because the evidence did not satisfy the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and was also inadmissible under Fed.R.Evid. 403. The district court adopted the magistrate's recommendations and excluded the evidence. We find no abuse of discretion.

United States v. Piccinonna, 885 F.2d 1529 (11th Cir.1989) (*en banc*) restricts the use of polygraph evidence in this Circuit to only two contexts. A district court may admit polygraph evidence when the parties *1302 stipulate in advance as to the test's circumstances and scope of its admissibility, or

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[4] We stress, however, that we review the record de novo when conducting a harmless error analysis, unlike our review of sufficiency of the evidence challenges, in which we view witness credibility in the light most favorable to the government. Hands, 184 F.3d at 1330 n. 23.

"to impeach or corroborate the testimony of a witness at trial." *United States v. Gilliard*, 133 F.3d 809, 811-12 (11th Cir. 1998) (citing *Piccinonna*, 885 F.2d at 1536 (*en banc*)). However, this rule does not "preempt[ ] or limit[ ] in any way the trial court's discretion to exclude polygraph expert testimony on other grounds under the Federal Rules of Evidence." *Id.* (citing *Piccinonna*, 885 F.2d at 1536 (*en banc*)).

It is the second category which concerns us here. To admit polygraph evidence to impeach or corroborate a witness' testimony, the proponent must satisfy three conditions. *Piccinonna*, 885 F.2d at 1536. First, it must provide adequate notice to the opposing party that it will offer polygraph evidence. *Id.* Second, the opposing party must be given a "reasonable opportunity to have its own polygraph expert administer a test covering substantially the same questions." *Id.* Third, the Federal Rules of Evidence for the admissibility of corroboration or impeachment testimony will govern the proffer. *Id.*

We find that even if the admission of the polygraph evidence was proper to corroborate Henderson's testimony under *Piccinonna*, the district court did not abuse its discretion in excluding it under Rule 702, as interpreted by *Daubert*, which requires expert scientific evidence to be both reliable and relevant pursuant to Rule 702. *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786. Thus, the evidence must: (1) constitute scientific knowledge; and (2) assist the trier of fact to understand the evidence or to determine a fact at issue. Id. at 589-91, 113 S.Ct. 2786. The scientific knowledge question requires the trial court to consider the theory or technique upon which the testimony is based in light of at least five factors:

(1) whether the theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) the known or potential rate of error for that theory or technique;

(4) the existence and maintenance of standards controlling the theory or technique's operation; and

(5) whether the theory or technique has attained general acceptance within the relevant scientific community.

Id. at 593-94, 113 S.Ct. 2786; *Gilliard*, 133 F.3d at 812. In determining whether the evidence appropriately assists the trier of fact, the *Daubert* Court underlined the enhanced importance and role Fed.R.Evid. 403 plays in excluding overly prejudicial evidence, because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786 (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

The magistrate judge excluded Henderson's proffered polygraph evidence as not constituting scientific knowledge and as being insufficiently relevant. She analyzed all five *Daubert* factors in coming to her first conclusion, finding that polygraph techniques were subject to peer review and publication but concluding that none of the four remaining factors supported admissibility.

First, she found that the theories of polygraphy at issue could not adequately be tested. Polygraphs monitor the subject's physical responses to questioning. *United States v. Scheffer*, 523 U.S. 303, 313, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (plurality opinion). An examiner then interprets the physiological data and opines about whether the subject was

lying. Id. *1303 (plurality opinion).[5] The magistrate concluded that while the physical responses recorded by a polygraph machine may be tested, "there is no available data to prove that those specific responses are attributable to lying." Second, she remarked that the error rate for polygraph testing "is not much more reliable than random chance and does not meet the stricter standards of scientific methods required by Rule 702 and *Daubert*." Third, she noted that despite the presence of standards regulating polygraphers, all compliance is self-imposed, and that effective countermeasures existed to defeat accurate results. Finally, she determined that polygraphy did not enjoy general acceptance from the scientific community, relying both on disagreement between federal Circuit courts and Justices of the U.S. Supreme Court over the effectiveness of polygraphs, and from one of Henderson's own witnesses. The district court approved and adopted the report and recommendation in its entirety.

Even if we presume that Henderson sought to admit the polygraph evidence solely to corroborate Henderson's testimony at trial (and there is no indication from his motion *in limine* that such was the case), its exclusion was not an abuse of discretion under Rule 702. The Supreme Court itself has clearly indicated that reasonable judges can disagree over the reliability of polygraph methodology. *Scheffer*, 523 U.S. at 309, 118 S.Ct. 1261 (majority opinion) (holding that per se exclusion of polygraph testimony did not violate the Sixth Amendment) ("[T]here is simply no consensus that polygraph evidence is reliable. To this day the scientific community

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[5] There are multiple methods of questioning that examiners employ, some more accepted than others. *See generally Gilliard*, 133 F.3d at 812-15. It is unclear which types of questioning were used here, but the answer in this case is ultimately immaterial to the district court's use of discretion in excluding the evidence, given the district court's findings and the Supreme Court's statements in *Scheffer*. *See infra*.

remains extremely polarized about the reliability of polygraph techniques."); *id.* at 312, 118 S.Ct. 1261 (majority opinion) ("Although the degree of reliability of polygraph evidence may depend on a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."); *see also Piccinonna*, 885 F.2d at 1535 (*en banc*) ("[P]olygraphy is a developing and inexact science[.]"). We also note that we have yet to hold that exclusion of polygraph evidence at trial was an abuse of discretion under *Piccinonna*.[6] The trial court did not abuse its discretion in excluding the evidence under Rule 702.[7]

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[6] However, we have held that prosecutorial suppression of exculpatory polygraph evidence admissible under Florida law constituted a *Brady* violation. *Jacobs v. Singletary*, 952 F.2d 1282, 1287-89 (11th Cir.1992).

[7] The dissent argues that, in determining that the district court did not abuse its discretion by excluding Henderson's polygraph evidence on the basis that it did not satisfy the *Daubert* factors and was thus insufficiently reliable under Fed.R.Evid. 702, we have "reversed the holding of *Piccinonna* that polygraph evidence is sufficiently reliable to be generally admissible at trial in this circuit." *Post* at 1310 (Hill, J., dissenting). The dissent therefore contends that when a district court excludes polygraph evidence "for not satisfying the *Daubert* factors," its decision is based on an erroneous view of *Piccinonna* and thus constitutes an abuse of discretion *per se*. *Post* at 1310 (Hill, J., dissenting).

But the dissent overstates the scope of the *en banc* Court's holding in *Piccinonna*. *Piccinonna* predates *Daubert*, and its holding is specifically restricted to the admissibility of polygraph evidence under the now-defunct Frye "general acceptance test," which prior to *Piccinonna* raised a *per se* bar to admission of polygraph evidence in this Circuit. *Piccinonna*, 885 F.2d at 1531-32 (*en banc*). To quote the *en banc* Court, "Our holding states merely that in the limited circumstances delineated above, the Frye general acceptance test does not act as a bar to admission of polygraph evidence as a matter of law." *Id.* at 1536. We were also careful to note that "[n]either of [the] two modifications to the per se exclusionary rule should be construed to preempt or limit *in any way* the trial court's discretion to

See *1304 *Gilliard*, 133 F.3d at 814-15. We need not reach whether Rule 403 would also have permitted exclusion.

5. Exclusion of Henderson's Expert on Police Procedure

Next, Henderson argues that the district court violated his fundamental right to present witnesses in his own defense by excluding expert testimony opining that Henderson's alleged action of throwing his gun into his car before arresting Grant was appropriate and the best decision under the circumstances. In support of this opinion, the expert was to have provided statistics about the number of officers injured with their own weapons and testimony that officers are trained to keep their service weapons out of reach during a ground fight.

The issue in this case was not whether it was proper police procedure for an officer to place his service weapon out of reach before engaging a suspect in a physical confrontation, but whether or not Henderson actually did so. Federal Rule of Evidence 702 restricts expert testimony to evidence that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. There was thus no abuse of discretion in excluding the evidence, and no

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exclude polygraph expert testimony on other grounds under the Federal Rules of Evidence." *Id.* (emphasis added); *see also Gilliard*, 133 F.3d at 812. *Daubert*, of course, held that "*Frye* has been superseded," 509 U.S. at 589 n. 6, 113 S.Ct. 2786, and outlined five factors that guide a district court's inquiry, pursuant to Fed.R.Evid. 702, into whether proffered scientific expert testimony is sufficiently reliable. *Id.* at 589-95, 113 S.Ct. 2786. Because *Piccinonna*'s holding concerned only the admissibility of polygraph evidence under the *Frye* "general acceptance test," it does not preclude a district court from excluding polygraph evidence for not satisfying the *Daubert* factors. In fact, this Circuit has already held that a district court did not abuse its discretion when it excluded polygraph evidence for failure to satisfy the *Daubert* factors. *Gilliard*, 133 F.3d at 814-15.

infringement upon the defendant's constitutional rights. *See Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); *Frazier*, 387 F.3d at 1271 (*en banc*).

6. Admission of Evidence about the Dismissal for Misconduct of the Sheriff Who Had Hired Officer Henderson

Henderson argues that the district court impermissibly allowed the government to introduce evidence that the sheriff who had hired Henderson was removed for fraud after Grant's arrest but before trial. Although he does not cite any specific rule of evidence upon which to base his argument, we infer from Henderson's argument that this evidence established his "guilt by association" and from the cases he cites that Fed.R.Evid. 403 and 404(b) are the appropriate foundations. Rule 404(b) prohibits admitting evidence of "other crimes, wrongs, or acts" to "prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). However, the government proffered this evidence not to show Henderson's bad character and his actions in conformity therewith, but instead to rehabilitate the credibility of Detective Bennett, whom Henderson had impeached for having been disciplined by the sheriff's office during this sheriff's tenure. Nor did the district court abuse its discretion in *1305 admitting this evidence pursuant to Fed.R.Evid. 403. The information did little to prejudice Henderson given the context in which the government elicited the testimony, and was of probative value in rehabilitating Detective Bennett.

III. EXCLUSION OF LAW ENFORCEMENT OFFICERS FROM THE GRAND AND PETIT JURY POOLS

The 1968 Jury Selection and Service Act, 28 U.S.C. § 1863, requires each U.S. District Court to "devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of [the Act]." 28 U.S.C. § 1863(a) (2005). The Act also requires the plan to bar

> members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession . . . public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

Id. § 1863(b)(6) (2005).

On the other hand, a criminal defendant enjoys a Sixth Amendment right to an impartial jury trial, which includes a right to the presence of a fair cross-section of the community on venire panels, or lists from which grand and petit juries are drawn. *Taylor v. Louisiana*, 419 U.S. 522, 526-29, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (petit jury); *United States v. Terry*, 60 F.3d 1541, 1544 (11th Cir.1995) (grand and petit juries). To show a *prima facie* violation of this right, a defendant must prove:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); *Terry*, 60 F.3d at 1544. The state may rebut a *prima facie* showing that its exemption or qualification violates a defendant's Sixth Amendment rights if "it may be fairly said that the jury lists or panels are representative of the community," and that "a significant state interest is manifestly and primarily advanced by those aspects of the jury selection process...that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 367-68, 99 S.Ct. 664. This Circuit has held that the exclusion of jurors to the extent 28 U.S.C. § 1863(b)(6) requires is constitutional, reasoning that even if a defendant could prove that a plan under § 1863(b)(6) established a prima facie violation, the state could rebut that *prima facie* case under the *Duren* standard. *Terry*, 60 F.3d at 1543-44.

The Middle District of Florida adopted the provisions of 28 U.S.C. § 1863(b)(6) in their entirety in its Plan for the Qualification and Random Selection of Grand and Petit Jurors ("Jury Plan"). However, the Middle District's Juror Questionnaire Form exempts federal law enforcement officers, a group that the Jury Plan and § 1863(b)(6) do not exempt. Moreover, it is undisputed that the pattern and practice in the Middle District of Florida is to exempt anyone with arrest powers, including part-time law enforcement officers and even private law enforcement *1306 officers. In support of his Sixth Amendment argument at trial, Henderson indicates that at least 0.55% of the estimated eligible juror pool in the Ft. Myers

Division of the Middle District is exempt as law enforcement officers.

Although the exemption here is somewhat broader than the exemption considered in *Terry*, we believe that it is still constitutional, even assuming that Henderson can show a *prima facie* Sixth Amendment violation. The Middle District's exemption does not reach much further than the exemption in *Terry*. Even relying on Henderson's figures, federal, part-time, and private law enforcement officers would only compose a fraction of the 0.55% of eligible jurors in the pool. It thus "may be fairly said that the jury lists or panels are representative of the community." Moreover, "a significant state interest is manifestly and primarily advanced" by this somewhat broader exemption, particularly with respect to federal law enforcement officers. The exemption of individuals in part-time and private law enforcement also "manifestly and primarily" advances the same significant state interest of "allowing police officers to perform their duties without the interruption of jury service," although not to the same extent. Thus, the Middle District's Jury Plan did not violate Henderson's constitutional rights.

Nor can Henderson prevail on his statutory argument that the Jury Plan exceeds the scope of the Act. A criminal defendant must show more than a "technical violation" of the Act to obtain relief. *United States v. Tuttle*, 729 F.2d 1325, 1328 (11th Cir.1984), *cert. denied*, 469 U.S. 1192, 105 S.Ct. 968, 83 L.Ed.2d 972 (1985). Rather, he must show a "substantial failure to comply" with its provisions, which means the violation must have "a significant impact on the composition of an average jury." *Id.* We have held that underrepresentation by an average of 1.4 persons on a 23-person jury panel does not constitute a sufficiently significant impact. *United States v. Goff*, 509 F.2d 825, 826-27 (5th Cir.), *cert. denied*, 423 U.S. 857, 96 S.Ct. 109, 46 L.Ed.2d 83 (1975). Similarly, *United States v. Hawkins*, 661 F.2d 436

(5th Cir. Unit B Nov.1981),[8] held that underrepresentation by two persons per 23-juror pool did not meet this standard. *Id.* at 443. And in Tuttle, underrepresentation of an average of 0.96 jurors from a 12-person pool was held insufficient. 729 F.2d at 1328-29. Since Henderson's figures state that law enforcement officers as a whole compose only 0.55% of the population in the division, the additional sweep of the Jury Plan in this case excludes, on average, less than one juror per 23-person panel. This does not constitute a significant enough impact on the composition of an average jury to violate the Act.

IV. SENTENCING ERRORS

Henderson makes several challenges to his sentence, including an argument made for the first time on appeal that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), render his sentence unlawful. Because Henderson's *Blakely/Booker* claim entitles him to resentencing, we do not reach his other claims.

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to *1307 a jury, and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Blakely*, the Supreme Court held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.*, 124 S.Ct. at 2537. And in *Booker*, it applied this holding to sentences imposed under the United States Sentencing Guidelines. *Id.*,

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[8] In *Stein v. Reynolds Securities, Inc.*, the Eleventh Circuit adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981. 667 F.2d 33 (11th Cir.1982).

125 S.Ct. at 749 ("As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington [sentencing] procedures at issue in that case."). Accordingly, it held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756. In light of this holding, the *Booker* Court also held the mandatory sentencing guidelines unconstitutional, and excised two parts of the Sentencing Reform Act to cure the constitutional defects: 18 U.S.C. § 3553(b)(1), making the guidelines result binding on the sentencing court; and § 3742(e), requiring de novo review of sentences on appeal. Id. at 764. Thus, the remainder of the Sentencing Reform Act now satisfies constitutional requirements. *Id.* Both *Booker* holdings apply retroactively to cases on direct review. Id. at 769 ("We must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review.").

Because Henderson raised his *Blakely/Booker* challenge for the first time on appeal, we review it for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1297-98 (11th Cir.2005). Under that standard, we may only grant the defendant relief when, at the time of appeal, there is: (1) error, (2) that is plain, and (3) that affects substantial rights. *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Once these three requirements are satisfied, we have the discretion to provide relief if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Henderson's sentence is in error because it violates *Booker*. In this case, the district court found, by a preponderance of the evidence, that the illegal use of force involved an aggravated assault with a firearm, that Henderson used the firearm with intent to cause bodily injury, and that the aggravated assault resulted in bodily injury. Combined with other enhancements and his criminal history category of I, the guidelines provided for a sentencing range of 87-108 months. The judge imposed a sentence of 87 months, but remarked that she "[thought] that probably under the circumstances, that's a little high. . .but that's what the guidelines call for and that's what I'm obligated to sentence him."

This 87-month sentence exceeded the maximum authorized by the facts established by the jury verdict, and facts necessary to support that sentence-- namely, those supporting the firearm-related enhancements--were not found by a jury beyond a reasonable doubt or admitted by the defendant, and did not constitute prior convictions. Thus, under *Booker*, Henderson's sentence violated his Sixth Amendment rights. *See Rodriguez*, 398 F.3d at 1298.

This constitutional *Booker* error also qualifies as "plain," because "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that the error be 'plain' at the time of appellate consideration." *1308 *Johnson v. United States*, 520 U.S. 461, 467-68, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *see also Rodriguez*, 398 F.3d at 1299.

The error also affected Henderson's substantial rights, because the district judge imposed the lowest permissible sentence under the mandatory guidelines and stated that she thought the sentence was too high, but was bound by the guidelines in any case. An error that "affects substantial rights" is one that "affected the outcome of the district court

proceedings." *Cotton*, 535 U.S. at 632, 122 S.Ct. 1781 (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). The defendant bears the burden of proving that the error affected his substantial rights. *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. To discharge this burden, the Supreme Court held that the defendant must establish a "reasonable probability that, but for the error," the outcome would have been different. *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2340, 159 L.Ed.2d 157 (2004). A reasonable probability of a different result is one that is "sufficient to undermine confidence in the outcome of the proceeding." *Id.* (internal quotation marks omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). In the *Booker* context, we therefore ask whether there is a reasonable probability that the district court would impose a lesser sentence on remand under an advisory guidelines scheme than the unconstitutional sentence it imposed under the mandatory guidelines scheme. *Rodriguez*, 398 F.3d at 1300-01.

At the very least, when the sentencing judge expressed an opinion that the required guidelines sentence was too severe, and, notably, sentenced the defendant to the lowest possible sentence in the guidelines range, as the judge did in Henderson's case, the defendant has met his burden of proving prejudice. *United States v. Shelton*, 400 F.3d 1325, 1332-33 (11th Cir.2005). He also has met the fourth prong of the plain-error test because the district court expressed a desire to impose a lower sentence than the guidelines permitted, and after *Booker* the district court has discretion to do so. See *id.* at 1333-34.

Because the district court committed plain error by using facts it found by a preponderance of the evidence to enhance Henderson's sentence beyond the maximum authorized by the

facts established by the jury's verdict, we vacate Henderson's sentence and remand this case to the district court for resentencing in accordance with *Booker*.

AFFIRMED in part, VACATED in part, and REMANDED.

FARRIS, Circuit Judge, concurring:

United States v. Piccinonna, 885 F.2d 1529 (11th Cir.1989) (*en banc*) represented a modification to the rule then in existence requiring *per se* exclusion of all polygraph evidence. As the majority rightly observes, the Court was careful to emphasize that nothing in its holding was intended to limit the trial court's discretion to exclude polygraph evidence. 885 F.2d at 1536.

Further, *Piccinonna* requires that a court inclined to admit polygraph evidence ensure that such evidence comply with the Federal Rules of Evidence. *Id.* The majority looks to Rule 702, but Rule 403 is also relevant. Two sets of tests were administered: in both sets, the polygraphers first reached inconclusive results and then found Henderson's answers truthful. The polygraph evidence was such that a trial court, without abusing its discretion, could elect to disallow it as failing to meet the standard of Rule 403. *See* *1309 *United States v. Gilliard*, 133 F.3d 809, 815-16 (11th Cir.1998) (polygraph evidence "likely would have diverted the jury's attention from the real issue in the case, that of the guilt or innocence of the defendant, to the issue of the validity of polygraph evidence in general").

The record also reflects significant and copious testimony from law enforcement witnesses to the incident (Detective Bennett, in particular), as well as from the victim. Further, there was the testimony of two police officers about Henderson's incriminating comments after the incident.

The admission of Dr. Scott's conclusion about the cause of the victim's jaw injury, if error, was harmless, since the precise nature of the injury is not an element of 18 U.S.C. § 242, the crime with which Henderson was charged. *United States v. Stokes*, 506 F.2d 771, 774 n. 3 (5th Cir.1975) (violation of § 242 occurs when an action is done under color of state law and

force used is unreasonable and unnecessary). Dr. Scott's causation opinion is, in my view, peripheral at best to the question of Henderson's guilt. The testimony complained of fails to introduce "grave doubt" as to the verdict. *See United States v. Frazier*, 387 F.3d 1244, 1267 n. 20 (11th Cir.2004).

In spite of my deep respect for my dissenting brother, I cannot agree, on this record, that Henderson did not receive due process of law or that his trial was fundamentally unfair.

HILL, Circuit Judge, dissenting:

Basing an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion *per se*. *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1232 (11th Cir.2004). I believe the majority has applied an erroneous view of the law to reject Henderson's claim of error in the trial court's exclusion of the results of his polygraph test, offered to bolster his testimony that he was innocent of the charge of use of excessive force. If so, the exclusion was a per se abuse of discretion, certainly extremely prejudicial, and, therefore, reversible error.

The district court excluded the results of two different polygraph tests, one conducted by the FBI and one conducted by a private examiner at Henderson's request. Both showed that he truthfully answered questions regarding the charged incident. In excluding these tests, the district court relied upon the magistrate judge's *Daubert* analysis of the admissibility of the tests.[1] This analysis concluded that Rule 702 required the exclusion of the polygraph evidence because it was not sufficiently scientific. The majority, as did the district court, adopts this conclusion.

I believe such a conclusion is foreclosed by our *en banc* opinion in *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir.1989). In *Piccinonna*, we held that "the science of polygraphy has progressed to a level of acceptance sufficient to allow the use of polygraph evidence in limited circumstances where the danger of unfair prejudice is minimized." *Id.* at 1537. Furthermore, we said that as to Rule 702 governing the

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[1] Henderson filed a motion *in limine* seeking to have the results of both tests admitted at trial. The magistrate judge recommended denial of the motion, and the district court adopted the magistrate's report and recommendation in its entirely.

admissibility of expert testimony, "the trial court may exclude polygraph expert testimony because 1) the polygraph examiner's qualifications are unacceptable; 2) the test procedure was unfairly prejudicial or the test was poorly administered; or 3) the questions were irrelevant or improper." Id. As I believe the record is clear that none of these factors was present in the proffered tests, I believe the district court erred in excluding the evidence.

It appears that our panel has reversed the holding of *Piccinonna* that polygraph evidence is sufficiently reliable to be generally admissible at trial in this circuit. Instead, the majority agrees with the magistrate judge's conclusion that such evidence is inherently unscientific.[2] Only this court sitting *en banc* can accomplish such a reversal.[3] While such evidence may be excluded for other reasons, including those listed

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[2] The district court's exclusion of the polygraph evidence resulted from adoption of the magistrate judge's Report and Recommendation. That report tracks language found in *Piccinonna* but it tracks the dissent. Perhaps this is a compliment to those of us who dissented in that case, but, alas, the majority opinion is the precedent.

[3] The majority appears to believe that *Daubert* overruled *Piccinonna* by instituting a new test for determining the admissibility of scientific evidence. I do not believe, however, that the adoption of this new test, without any mention of *Piccinonna*, had the effect of undoing the holding of *Piccinonna* that polygraph evidence is sufficiently reliable to be generally admissible at trial. As I understand *Piccinonna*, the results of a particular polygraph test may be inadmissible if the challenger is successful in showing that the results are unreliable for one of the three reasons enumerated in *Piccinonna*. This was, for example, the reason that the polygraph test was held inadmissible in *Gilliard* because the particular test at issue was administered unreliably, not because polygraphy itself is inherently unreliable. 133 F.3d at 814-15. Since there was no showing in this case that the particular test was administered unreliably, the exclusion of probative evidence of truthfulness merely because it was the product of polygraphy seems to me to be contrary to *Piccinonna* and reversible error.

above, its exclusion for not satisfying the Daubert factors is based upon an erroneous view of the law of this circuit, and is, therefore, a per se abuse of discretion.[4]

I am troubled as well by the rejection of Henderson's claim of error in the trial court's decision to admit some very troubling testimony by the victim's treating physician. The physician was not permitted to testify as an expert because the government failed to provide the defense with sufficient notice. Nonetheless, she was permitted to testify, over objection, that the victim's injury was the result of a blow to the left side of his face, the very conduct for which Henderson was charged. This testimony concerning the ultimate factual issue in the case could not have been more prejudicial, and I believe it to be in direct contravention of Rule 702(c). Subsection (c) was added to Rule 702 in 2000 to avoid precisely this sort of "risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed.R.Evid. 701, Advisory Committee Note.

A lay witness may offer an opinion only if it is not based on scientific, technical or other specialized knowledge within the scope of Rule 702. Fed.R.Evid. 701. It is clear to me that the physician in this case, although barred from giving her expert opinion, was asked by the government for just such an opinion regarding the source of the victim's injuries. Furthermore, since the source of this injury was the ultimate factual issue in the case, I believe that the testimony was not only inadmissible expert testimony, but highly prejudicial. I believe that its admission was reversible error.

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[4] We have held that prosecutorial suppression of exculpatory polygraph evidence admissible under Florida law constitutes a *Brady* violation. *Jacobs v. Singletary*, 952 F.2d 1282, 1287-89 (11th Cir.1992).

Finally, I am also troubled by the exclusion of Henderson's evidence regarding proper police procedure for the officer's gun during a takedown,[5] and the admission *1311 of evidence that the sheriff who hired Henderson was removed for fraud.[6]

Without analyzing these claims, I would note that even if none of Henderson's individual claims of error had been sufficient, standing alone, to give me pause as to this conviction, I am confident that all of them, taken together, are sufficient to raise grave doubts as to the fundamental fairness of Henderson's trial and conviction. *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir.1983) ("A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution"). Whatever we think about the charges against him, Henderson has a right to expect that his trial will be conducted according to due process of law. After such a trial, a conviction may be relied upon not only for its correctness, but also for its fundamental fairness.

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[5] As I read the record, the ultimate reason the district court disallowed Henderson's expert to testify that Henderson followed correct police procedure in "disarming himself" before the takedown was simply that the government had not introduced expert testimony to the contrary. This does not seem to me a correct legal basis for the exclusion, nor a plausible one.

[6] Since the district court prohibited speaking objections, it is not clear whether the defendant's reasons for offering this evidence were completely clear to the court.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Case No. 2:03-cr-65FtM-22SPC

UNITED STATES OF AMERICA

-vs-

WYATT O. HENDERSON

November 10, 2003

ORDER

I. INTRODUCTION

This cause comes before the Court for consideration of the Defendant's, Wyatt O. Henderson's (hereinafter "the Defendant" or Mr. Henderson"), Motion to Dismiss Indictment and Alternative Motion for Alternative Petit Jury Pool Challenging Jury Selection Process and Incorporating Memorandum Brief in Support Thereof (Doc. No. 34), filed September 15, 2003, to which the United States of America (hereinafter, "the Government") responded (Doc. No. 51) on October 17, 2003. A hearing was held on Monday, November 3, 2003. Having reviewed the motion, the memoranda, and the evidence adduced at the hearing, the Court **DENIES** the Defendant's Motion to Dismiss Indictment and Alternative Motion for Alternative Petit Jury Pool Challenging Jury Selection Process (Doc. No. 34).

II. BACKGROUND

On September 18, 2003, the Defendant, a former detective with the Charlotte County Sheriff's Department, was indicted on three counts by a grand jury convened in the Middle District of Florida.[1] Count One of the Indictment alleges the use of excessive force under color of law while making an arrest.[2] Count Two charges submission of a false police report.[3] Finally, Count Three alleges that the Defendant made a false statement while employed as a detective.[4]

It is undisputed that the United States District Court for the Middle District of Florida's policies and practices precluded law enforcement officers from participating in the pool of jurors from which the grand jury indicting the Defendant was drawn. It is also undisputed that the Middle District of Florida's policies and practices - in the absence of an order from the undersigned - will preclude law enforcement officers from participating in the pool of jurors from which the petit jury will be drawn. For this reason, the Defendant challenges this Court's jury selection process.

The Jury Selection and Service Act of 1968, as amended by 28 U.S.C. § 1863, provides, in pertinent part, that the following persons are barred from jury service on the ground that they are exempt:

> (A) members in active service in the Armed Forces of the United States;

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1 *See generally* Superseding Indictment (Doc. No. 36).

2 *See id.* at 1.

3 *See id.* at 2.

4 *See id.* at 2-3.

(B) members of the fire or *police departments* of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession;

(C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

28 U.S.C. § 1863(b)(6) (emphasis added).

28 U.S.C. § 1869(i) defines public officer as "a person who is either elected to public office or who is directly appointed by a person elected to public office."

Pursuant to Rule 4.13(b)[5] of the Local Rules of the Middle District of Florida, the United States District Court for the Middle District of Florida has adopted, in its entirety, the provisions of 28 U.S.C. § 1863 (b)(6) in its Plan for the Qualification and Random Selection of Grand and Petit Jurors (hereinafter, "The Jury Plan"). In relevant part, The Jury Plan provides:

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[5] Local Rule 4.13(b) provides as follows:

Pursuant to the requirements of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. Section 1863, the Court has adopted, with the approval of the Judicial Council of the Eleventh Circuit, a plan for the random selection of grand and petit jurors. A copy of the plan, as amended, shall be available for inspection in the Clerk's offices during regular business hours.

> In accordance with 28 U.S.C. Section 1863(b)(6), the Court finds that individuals who comprise the following groups of persons or occupational classes shall, in the public interest, be exempt from performing jury service, and that their exemption is not inconsistent with the policies set forth in 28 U.S.C. Sections 1861 and 1862.
>
> (a) Members in active service in the Armed Forces of the United States;
>
> (b) Members of the fire or police departments of any state, district, territory, possession, or subdivision thereof; or
>
> (c) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any state, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of their official duties.

The Jury Plan, §7.04 at p. 12.

On June 23, 2003, the most recent version of The Jury Plan was approved by the Eleventh Circuit Court of Appeals. *See generally* The Jury Plan. The most recent plan and the plan in affect when the indictments were returned in this case are identical in all pertinent parts.

Although The Jury Plan tracks the language of 28 U.S.C. § 1863(b)(6) verbatim, the Middle District of Florida's Juror Questionnaire Form (hereinafter, "The Juror Form"), which was prepared by the Administrative Office of the U.S. Courts

in accordance with 28 U.S.C. § 1869(h),[6] is worded differently. In pertinent part, The Juror Form reads as follows:

> 9. **EXEMPTIONS**
>
> ARE YOU EMPLOYED ON A FULL TIME BASIS AS A PUBLIC OFFICIAL OF THE UNITED STATES, STATE, OR LOCAL GOVERNMENT WHO IS ELECTED TO PUBLIC OFFICE OR DIRECTLY APPOINTED BY ONE ELECTED TO OFFICE
>
> MEMBER OF *ANY GOVERNMENTAL POLICE* OR REGULAR FIRE DEPT. (NOT INCLUDING VOLUNTEER OR NON-GOVERNMENTAL DEPARTMENTS)
>
> MEMBER IN ACTIVE SERVICE OF THE ARMED FORCES OF THE UNITED STATES.

The Juror Form, Exemption #9 at p. 1.

While neither the Jury Selection and Service Act nor The Jury Plan mention federal law enforcement officers (e.g. FBI, DEA, U.S. Marshals), The Juror Form exempts all governmental law enforcement officers. In addition, the pattern and practice in the Middle District of Florida is to exempt anyone with arrest powers including part-time law enforcement officers and even private law enforcement officers. Finally, it is apparent that as permitted by 28 U.S.C. § 1863(b)(5)(B),

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[6] 28 U.S.C. § 1869(h) provides, in pertinent part, as follows:

> '[J]uror qualification form' shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit . . . whether [a potential juror] should be excused or exempted from jury service.

voluntary safety personnel are excused from jury service in the Middle District of Florida.[7]

Based on the foregoing, The Defendant challenges The Jury Plan, policies, and practices of the Middle District of Florida on the grounds that: (1) they violate the Sixth Amendment to the United States Constitution; (2) they violate the Defendant's right to equal protection under the laws; and (3) they violate federal law and the district's own jury plan.

III. LEGAL ANALYSIS

It is well settled that "[c]hallenges to the jury selection process may be based on the fair cross-section requirement of

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[7] Section 7.05 of the Jury Plan provides, in relevant part, as follows:

> ***PERSONS WHO MAY BE EXCUSED FROM JURY SERVICE***
>
> (a) ***Permanent Excuse Upon Individual Request***: In accordance with 28 U.S.C. 1863(b)(5), the Court finds that service by the following persons or members of the following occupational classes would entail undue hardship or extreme inconvenience to such individuals, and that granting individual requests for permanent excuse from such persons would not be inconsistent with the policies set forth in 28 U.S.C. §§ 1861 and 1862.
>
> (1) Persons over 70 years or age; or
>
> (2) Persons having responsibility for providing in-home care and custody of a child or children under the age of ten (10)[;] or
>
> (3) Persons who are essential to the care of aged or infirm persons; or
>
> (4) Persons who have served as a grand or petit juror in a federal court within the past two years; or
>
> (5) Voluntary safety personnel serving a public agency as a non-compensated fire fighter or member of an ambulance or rescue squad.

The Jury Plan, § 7.05 at p. 12.

the Sixth Amendment, . . . the equal protection component of the Fifth Amendment, . . . or a substantial failure to comply with the provisions of the [Jury Selection and Service] Act [of 1968]." *United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996) (internal citations omitted). In accordance with this framework, the Court will consider each of the Defendant's challenges seriatim.[8]

A. THE SIXTH AMENDMENT

The Sixth Amendment to the United States Constitution provides: "In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. Const. Amend. VI. Interpreting this provision, the United States Supreme Court has concluded that the Sixth Amendment requires the production of a jury encompassing a fair cross-section of the community. *See Holland v. Illinois*, 493 U.S. 474, 480 (1990); *Duren v. Missouri*, 439 U.S. 357, 358-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The purpose of this "requirement [is] to prevent the improper conviction of defendants by biased or partial juries, promote public confidence in the fairness of the criminal justice system, and ensure that the civic responsibility of jury service is shared by all members of the community." *Willis v. Kemp*, 838 F. 2d 1510, 1513-14 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989) (internal citations omitted).

In order "[t]o establish a prima facie case that a jury selection process does not produce a fair cross-section of the community, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that

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[8] The procedure for challenging the jury selection process is set forth in 28 U.S.C. § 1867. In this case, the Defendant has complied with all relevant requirements.

the representation of the group in venires is not fair and reasonable in relation to the number of such persons in the community, and (3) that the underrepresentation is due to systemic exclusion of the group in the jury-selection process." *United States v. Grisham*, 63 F. 3d 1074, 1078 (11th Cir. 1995) (internal citations omitted); *see also United States v. Terry*, 60 F. 3d 1541, 1544 (11th Cir. 1995) (accord), *cert. denied*, 516 U.S. 1060 (1996); *Willis*, 838 F. 2d at 1514; *United States v. Rodriguez*, 776 F. 2d 1509, 1511 (11th Cir. 1985).

"Once the complainant establishes all three elements of his prima facie case, the government bears the burden of showing attainment of a fair cross[-]section to be incompatible with a significant state interest." *Willis*, 838 F. 2d at 1514 (internal citations and quotations omitted).

In this instance, the Defendant claims that exempting federal, state, local, and even private law enforcement officers (with arrest powers), both full and part-time, violates the fair cross-section requirement afforded by the Sixth Amendment. In support of that argument, the Defendant calls attention to demographics evincing that of an estimated 545,116 eligible jurors in the Ft. Myers Division, at least 3,000 (0.55%) are exempt as law enforcement officers.

Assuming, without deciding, that this evidence establishes that the Middle District of Florida excludes a distinctive group in the community from jury service[9], that the group's

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[9] A distinctive group in the community, when viewed objectively, is a collection of people "defined or limited by some factor in a manner that sets it apart from the remainder of the community." *Willis v. Kemp*, 838 F. 2d 1510, 1516 (11th Cir. 1988) (internal citations omitted). "Moreover, the group must be internally cohesive, i.e., there must be a common thread or similarity of attitudes binding all members of the group." *Id.* (internal citations omitted). "Finally, these attitudes must not be shared by the remainder of the community, such that the interest of the cognizable group

representation is not fair and reasonable in relation to its population in the community, and that the under-representation is due to systemic exclusion in the jury selection process, this Court finds that the Government has sufficiently rebutted the Defendant's case by demonstrating a significant state interest: keeping state and federal law enforcement officers on the street.

The case of *United States v. Terry* is instructive on this point. There, the Eleventh Circuit Court of Appeals concluded that exempting police officers "from jury service because it is good for the community that they not be interrupted in their work does not violate the United States Constitution." *Terry*, 60 F. 3d at 1544 (internal citations omitted).

Following *Terry*, this Court concludes that allowing state and federal law enforcement officers and/or safety personnel, whether full or part-time, to perform their duties without interruption of jury services benefits the community. Accordingly, the Court finds no violation of the Defendant's Sixth Amendment rights.

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will not be represented if it is excluded from jury service." *Id.* (internal citations omitted).

In this instance, the Defendant argues that law enforcement officers are a distinctive group in the community because "[b]y systematically barring law enforcement officers from jury duty, the statute and The Plan have created its own distinctive groups. When certain people are systematically excluded by category that creates the group for distinct treatment." Doc. No. 34 at 5 (internal citations omitted).

This Court rejects this perfunctory analysis. Although police officers are generally regarded as a group that is internally cohesive, there is no evidence suggesting that this cohesiveness extends to all law enforcement groups. In fact, history suggests the opposite; in major investigations federal law enforcement officials (i.e., the FBI) and state law enforcement officials compete against one another. Furthermore, there is no evidence suggesting that the attitudes shared by law enforcement officers are not shared by the remainder of the community.

B. EQUAL PROTECTION

The equal protection prima facie case for establishing discrimination in jury selection is almost identical to the prima facie case establishing a Sixth Amendment fair cross-section violation. *See United States v. Perez-Hernandez*, 672 F. 2d 1380, 1384 n.5 (11th Cir. 1982). The only difference is that "the focus of an equal protection claim is whether members of a discrete group have been intentionally denied the opportunity to serve on a jury" whereas "the inquiry in a fair cross-section claim focuses on the representativeness of the jury venire." *United States v. Grisham*, 63 F. 3d 1074, 1081 (11th Cir. 1995). "[A] defendant [has] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *United States v. David*, 803 F. 2d 1567, 1570 (11th Cir. 1986) (internal citations and quotations omitted).

"To establish an equal protection violation in the jury selection context, a defendant must show "(1) that he or she is a member of a group capable of being singled out for discriminatory treatment, (2) that members of this group were substantially underrepresented on the venire, and (3) that the venire was selected under a practice providing an opportunity for discrimination." *Grisham*, 63 F. 3d at 1081 (11th Cir. 1995) (internal citation omitted); *see also Cunningham v. Zant*, 928 F. 2d 1006, 1013 (11th Cir. 1991).

"If the defendant makes his prima facie case, the burden shifts to the Government to dispel the inference of intentional discrimination." *Grisham*, 63 F. 3d at 1081 (internal citations omitted). Once the Government provides a legitimate explanation, the ultimate burden of proving discriminatory intent reverts back to the Defendant challenging the jury selection process. *See id.*

Preliminarily, this Court finds that the Defendant has failed to establish a prima facie case of discrimination. Law

enforcement officers and/or safety personnel are not in a group capable of being singled out for discriminatory treatment. In any event, this Court finds that the Government has provided a legitimate nondiscriminatory explanation for exempting law enforcement officers and/or safety personnel: it is good for the community that they not be disrupted in their work. The Defendant has not satisfactorily rebutted this justification. *See United States v. Terry*, 60 F. 3d 1541, 1544 (11th Cir. 1995) (accord). Accordingly, the Court rejects the Defendant's equal protection argument.

C. SUBSTANTIAL FAILURE TO COMPLY WITH PROVISIONS OF THE JURY SELECTION AND SERVICE ACT

The Jury Selection and Service Act of 1968 and The Jury Plan for the Middle District of Florida exempt only members of police departments of any State, the District of Columbia, or such territory or possession. *See* 28 U.S.C. § 1863(6)(B); *see also* The Jury Plan, §7.04 at p. 12. Nevertheless, the Juror Form promulgated by the Administrative Office of the United States Courts exempts any member of a governmental police force. Broader still are the pattern and practices of the Middle District which exempt any member of a police force with arrest powers whether federal, state, local, private, full-time or part-time.

Title 28 § 1863(5)(A) of the Jury Selection and Service Act requires that a district court's jury plan shall:

> [S]pecify those groups of persons or occupational classes whose members shall . . . be excused from jury service . . . Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

28 U.S.C. § 1863(5)(A). This Court's Jury Plan does not specify federal law enforcement officers as an occupational class whose members shall be excused from jury service.

While the abovementioned discrepancy is problematic, it is well established that "not every technical violation of the [Jury Selection and Service] Act justifies judicial relief; rather, the deficiency must constitute a 'substantial failure to comply' with the Act." *United States v. Tuttle*, 729 F. 2d 1325, 1328, (11th Cir. 1984), *cert. denied*, 469 U.S. 1192 (1985) (internal citations omitted). "A Jury Selection Act violation is substantial only if it frustrates the Act's two basic goals: (1) random selection of juror names; and (2) use of objective criteria for determination of disqualifications, excuses, exemptions, and exclusions." *United States v. Paradies*, 98 F. 3d 1266, 1279 (11th Cir. 1996), *cert. denied*, 522 U.S. 1014 (1997) (internal citations omitted).

Inasmuch as the Jury Selection and Service Act already excludes police officers employed by the States and their subdivisions, this Court finds that the Middle District of Florida's practices and policies excluding all law enforcement officers is a technical violation only and does not substantially contravene the Jury Selection and Service Act. This Court finds that failing to exempt or excuse state and federal law enforcement officers from jury service would entail undue hardship or extreme inconvenience to law enforcement and the community. Allowing law enforcement officers with arrest powers to perform their duties without interruption by jury service is good for the community; this is a proper objective criterion for exempting or excusing an entire occupational field.

IV. CONCLUSION

Base on the foregoing, it is **ORDERED** that the Defendant's, Wyatt O. Henderson, September 15, 2003 Motion to Dismiss Indictment and Alternative Motion for Alternative

Petit Jury Pool Challenging Jury Selection Process (Doc. No. 34) are **DENIED**.

DONE and **ORDERED** in Chambers, in Orlando, Florida this 10th day of November, 2003.

/s/ Anne C. Conway

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
United States District Judge John E. Steele
Administrative Law Clerk
Sheryl Loesch, Clerk of Court

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-11545-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WYATT HENDERSON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

FILED
JUL 15 2005
THOMAS K. KAHN
CLERK

Before: BARKETT, HILL AND FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett

UNITED STATES CIRCUIT JUDGE

APPENDIX D

28 U.S.C.A. § 1863

§ 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to

time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall--

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however*, That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall

prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county,

parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5)(A) except as provided in subparagraph (B), specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(B) specify that volunteer safety personnel, upon individual request, shall be excused from jury service. For purposes of this subparagraph, the term "volunteer safety personnel" means individuals serving a public agency (as defined in section 1203(6) of title I of the Omnibus Crime Control and Safe Streets Act of 1968) in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew.

(6) specify that the following persons are barred from jury service on the ground that they are exempt: (A) members in active service in the Armed Forces of the United States; (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

PLAN FOR THE QUALIFICATION AND RANDOM SELECTION OF GRAND AND PETIT JURORS

Revised by the District Court – April 16, 2003
Approved by the 11th Circuit Panel – June 23, 2003

CHAPTER ONE

GENERAL POLICY MATTERS

1.01 *ADOPTION AND IMPLEMENTATION*

Pursuant to the Jury Selection and Service Act of 1968 (Public Law 90-274), 28 U.S.C. Section 1861 et seq., the following *Plan for the Qualification and Random Selection of Grand and Petit Jurors*, hereinafter referred to as the Plan, is adopted, as amended, by this Court. The Plan shall be placed into operation upon approval by a reviewing panel of the United States Court of Appeals for the Eleventh Circuit.

This Plan is intended to conform to all relevant statutes and guidelines adopted by the Judicial Conference of the United States.

1.02 *DECLARATION OF POLICY*

This Plan is intended to incorporate and implement the policies set forth in 28 U.S.C. Section 1861, namely:

(a) That all litigants appearing before the United States District Court for the Middle District of Florida, who may be entitled to a trial by jury, shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the division wherein the Court convenes.

(b) That all citizens shall have the opportunity to be considered for service on grand and petit juries and shall have an obligation to serve when summoned for that purpose.

1.03 ***USE OF AUTOMATED DATA PROCESSING EQUIPMENT IN THE JUROR QUALIFICATION AND SELECTION PROCESS***

The Court finds that automated data processing systems, to include the use of optical scanning technology, can be utilized effectively in the selection, copying, and processing of names from the individual county source lists identified in Section 4.04 of this Plan, and in all other aspects of the juror qualification and selection process.

Therefore, the Clerk may elect to utilize automated data processing systems, or a combination of a manual and automated data processing systems, to assist in the juror qualification and selection process

1.04 ***USE OF NON-COURT PERSONNEL IN THE JUROR QUALIFICATION AND SELECTION PROCESS***

(a) ***Non-Court Personnel Defined:*** The Court finds that it may be necessary, or otherwise advantageous, for the Clerk to secure the services of non-court personnel to assist in the juror qualification and selection process. Such non-court personnel may include, but are not limited to:

(1) The Florida Department of State, Division of Elections, county officials, and their employees, responsible for custody and maintenance of the source lists identified in Section 4.04 of this Plan.

(2) Operators of automated data processing and optical scanning facilities and their employees and/or agents.

(3) Other administrative or clerical persons whose services may be necessary to select, process, and/or mail the various documents and records involved in the juror qualification and selection process.

(b) ***Direction of Non-Court Personnel:*** If the Clerk determines that it is necessary to secure the services of such non-court personnel, the Clerk shall, at a minimum:

(1) Issue written instructions to the individual(s) describing the operations or activities to be conducted.

(2) Require non-court personnel to execute an affidavit, under penalty of perjury, certifying compliance with the written instructions.

(3) Receive the written instructions and affidavit into the jury records of the Court.

CHAPTER TWO

ESTABLISHMENT OF JURY DIVISIONS

2.01 *ESTABLISHMENT OF JURY DIVISIONS*

(a) ***Authority:*** In accordance with 28 U.S.C. Section 1869(e)(2), and Local Rule 1.02, the following jury divisions are established within the Middle District of Florida:

(1) Tampa Jury Division
(2) Ft. Myers Jury Division
(3) Orlando Jury Division
(4) Jacksonville Jury Division
(5) Ocala Jury Division

(b) ***Composition of Jury Division:*** In accordance with Local Rule 1.02(b), the counties which comprise the Middle District of Florida shall be grouped into the foregoing jury divisions as provided in such Local Rule.

CHAPTER THREE

SUPERVISION AND MANAGEMENT

3.01 *RESPONSIBILITY FOR SUPERVISION OF THE JUROR QUALIFICATION AND SELECTION PROCESS*

In accordance with 28 U.S.C. Section 1863(b)(1), the Chief Judge of the Court shall be responsible for the overall supervision of the District's juror qualification and selection process.

Notwithstanding the responsibility vested in the Chief Judge, it is the intention of this Plan that supervision of the divisional juror qualification and selection process shall be separately accomplished within each of the jury divisions by a District Judge appointed by the Chief Judge.

3.02 *MANAGEMENT OF THE JUROR QUALIFICATION AND SELECTION PROCESS*

In accordance with 28 U.S.C. Section 1863(b)(1), the Clerk shall act under the supervision and control of the Chief Judge to manage the District's juror qualification and selection process, and under the supervision and control of the individual Supervising Judges to manage the day-to-day divisional juror qualification and selection process.

In accordance with 28 U.S.C. Section 1869(a), the Clerk may delegate responsibility for the day-to-day management of the district or divisional juror qualification and selection process to any authorized deputy clerk.

CHAPTER FOUR

ESTABLISHMENT OF MASTER JURY WHEELS

4:01 *MASTER JURY WHEEL DEFINED*

In accordance with 28 U.S.C. Section 1869(g), a "master jury wheel" shall mean any device or automated data processing system into which shall be placed the names of all the individuals randomly selected from the various source lists in accordance with Chapter Five of this Plan.

4.02 *ESTABLISHMENT OF DIVISIONAL MASTER JURY WHEELS*

In accordance with 28 U.S.C. Section 1863(b)(4), the Clerk shall establish and maintain a master jury wheel for each jury division established pursuant to Section 2.01 of this Plan.

4.03 *EMPTYING AND REFILLING THE MASTER JURY WHEELS*

Unless otherwise ordered by the Court, the Clerk is directed to empty and then refill the divisional master jury wheels between January 1, 1989, and October 31, 1989, and every odd numbered year thereafter between January 1 and October 31.

4.04 *SOURCE LISTS TO BE UTILIZED IN FILLING THE MASTER JURY WHEELS*

(a) ***Primary Source Lists:*** In accordance with 28 U.S.C. Section 1863(b)(2), voter registration lists shall be utilized as the primary source lists for filling the divisional master jury wheels.

(b) ***Alternate Source Lists:*** In accordance with 28 U.S.C. Section 1863(b)(2), if the Clerk determines that a particular county does not maintain a voter registration list, then the Clerk shall utilize the list of actual voters as an

alternate source list for selecting names of prospective jurors to be placed in the master jury wheels.

CHAPTER FIVE

FILLING THE MASTER JURY WHEELS

5.01 *FILLING THE MASTER JURY WHEELS*

In accordance with 28 U.S.C. Section 1863(b)(4), the Clerk shall initially fill the divisional master jury wheels with the minimum number of names indicated below. The Court finds that these totals are sufficient to meet the administrative requirements associated with the juror qualifications and selection process and that additional names would be cumbersome and unnecessary.

(a)	Tampa Master Jury Wheel	70,000 names
(b)	Ft. Myers Master Jury Wheel	25,000 names
(c)	Orlando Master Jury Wheel	50,000 names
(d)	Jacksonville Master Jury Wheel	40,000 names
(e)	Ocala Master Jury Wheel	20,000 names

5.02 *PLACEMENT OF ADDITIONAL NAMES IN THE MASTER JURY WHEELS*

From time to time it may be necessary to supplement the names within a particular divisional master jury wheel. In such a case, either the Chief Judge, or a Supervising Judge, may order the Clerk to obtain additional names from the primary or alternate source lists identified in Section 4.04 of the Plan to be placed into the divisional master jury wheel.

5.03 *PROCEDURES TO ENSURE PROPORTIONAL REPRESENTATION AND RANDOM SELECTION OF NAMES FROM THE SOURCE LISTS*

(a) Calculation of an Interval Number: The Clerk may employ the following minimum steps to ensure that substantial proportional representation exists between the counties comprising a particular jury division:

(1) Identify for each of the individual counties comprising a particular jury division, the state, local, and/or federal official having custody, possession, or control of the source lists identified in Section 4.04 of this Plan.

(2) Communicate with the appropriate official identified in the preceding subsection to determine:

(A) Whether the particular county maintains current voter registration lists, and if such lists are maintained, the total number of names contained on the voter registration lists as of the most recent general election.

In the event that the particular county periodically updates its voter registration lists, then the Clerk shall determine the total number of names on the voter registration lists as of a date to be specified by the Clerk following the most recent general election; or

(B) In the event that a particular county does not maintain current voter registration lists, the total number of actual voters

who voted in the most recent general election.

In the event that the county periodically updates and corrects its list of actual voters, then the Clerk shall determine the total number of names on the list of actual voters as of a date to be specified by the Clerk following the most recent general election.

(3) After determining the total number of names for each county, segregate the counties into the jury divisions defined in Section 2.01 of this Plan.

(4) Calculate the total number of names for all of the counties with a particular jury division.

(5) Divide the total number of names contained on all of the source lists in a particular jury division by the total number of names required to be initially placed in that jury division's master jury wheel pursuant to Section 5.01 of this Plan. The resultant value produced by this calculation shall be referred to as the ***interval number***. The interval number represents the interval between selected names on the various source lists, e.g.:

Assume that there are 660,000 names on the combined source lists for the counties comprising a particular jury division, and the total number of names required to be placed into that division's master jury wheel is 6,000, then the Clerk would divide 660,000 by 6,000. This calculation

would produce an ***interval number*** of 110.

(6) ***Selection of a Random Starting Number:*** After calculating the interval number for each jury division, the Clerk would then publicly draw at random a ***starting number*** from a range of numbers which shall include the number one through the interval number for each particular jury division. The starting number represents the first name to be selected from each county's source list.

(7) ***Use of the Starting Number and Interval Number to Randomly Select Names From the Source Lists:*** After calculating the interval and starting numbers, the Clerk shall arrange to select the first name from each county's source list which corresponds to the starting number, and thereafter, shall select every subsequent number throughout the remainder of the source list which corresponds to the interval number, e.g.:

> Assuming that the starting number for a particular jury division was 10, and the interval number for that jury division was 110, the Clerk would arrange that the tenth name from each county's source list be selected, and thereafter every 110th name throughout the remainder of the source lists for each county be selected, e.g. 10, 120, 230, 340, etc.

(b) ***Alternative Method of Random Selection:*** At the Clerk's option, and after consultation with the Court, the selection of names from complete source list databases in

electronic media for the master jury wheel may be accomplished by a purely randomized process through a properly programmed electronic data processing system. Similarly, at the option of the Clerk and after consultation with the Court, a properly programmed electronic data processing system for pure randomized selection may be used to select names from the master wheel for the purpose of determining qualification for jury service, and from the qualified wheel for summoning persons to serve as grand or petit jurors. Such random selections of names from the source list for inclusion in the master wheel by data computer personnel must insure that each county within the jury division is substantially proportionally represented in the master jury wheel in accordance with 28 United States Code, Section 1863 (b)(3). The selections of names from the source list, the master wheel, and the qualified wheel must also insure that the mathematical odds of any single name being picked are substantially equal.

5.04 PLACING NAMES INTO THE MASTER JURY WHEELS

Each name selected pursuant to section 5.03 shall be placed into the appropriate divisional master jury wheel.

CHAPTER SIX

DRAWING NAMES FROM THE MASTER JURY WHEELS

6.1 *DRAWING OF NAMES FROM THE MASTER JURY WHEEL*

In accordance with 28 U.S.C. Section 1864(a), the Clerk shall publicly draw at random from the master jury wheels the names of as many persons as may be required for jury service

6.02 *MAILING OF JUROR QUALIFICATION QUESTIONNAIRES*

In accordance with 28 U.S.C. Section 1864(a), the Clerk shall mail a juror qualification questionnaire to every person whose name is drawn from a master jury wheel.

6.03 *ACTIONS TO BE TAKEN WHEN A QUESTIONNAIRE HAS BEEN RETURNED AS "UNDELIVERABLE"*

When a questionnaire is returned as undeliverable, the Clerk shall verify the address on the questionnaire with the address for the particular juror contained in the records of the master jury wheel.

If the address on the questionnaire is not the same as that contained in the master jury wheel, the Clerk shall re-issue a new questionnaire with the corrected address; otherwise, the Clerk shall recommend, and the Court may find, that the person is not qualified for jury service pursuant to Section 7.01 of this Plan.

6.04 *ACTIONS TO BE TAKEN WHEN A QUESTIONNAIRE HAS NOT BEEN RETURNED*

In accordance with 28 U.S.C. Section 1864(a), any person who fails to return a completed questionnaire may be summoned by the Clerk to appear before the Clerk in order to fill out a questionnaire. However, it is not the intention of the Court to require the Clerk to summon every person who has failed to return their questionnaire.

In order to determine whether any particular person shall be summoned, the Clerk should first determine whether there have been sufficient numbers of returned questionnaires to permit the Court to qualify sufficient jurors for placement into

the appropriate qualified jury wheel established pursuant to Section 8.01 of this Plan.

If the Clerk determines that sufficient numbers of questionnaires have been returned, the Clerk shall recommend, and the Court may order, that the name of the person who failed to return the questionnaire be returned to the appropriate master jury wheel.

CHAPTER SEVEN

DETERMINING QUALIFICATION FOR JURY SERVICE

7.01 *DETERMINING QUALIFICATION STATUS OF PROSPECTIVE JURORS*

In accordance with 28 U.S.C. Section 1865(a), the Chief Judge or supervising Judge, on his or her initiative or upon recommendation of the Clerk, or the Clerk under supervision of the court, shall determine, solely on the basis of information provided on the questionnaire and other competent evidence, whether a person is qualified, unqualified, exempt from, or should be excused from jury service.

To assist the Court in evaluating the qualification status of prospective jurors, the Clerk shall initially review all returned questionnaires and shall evaluate each questionnaire in accordance with the qualification criteria established in this Plan.

After such review, the Clerk shall recommend a qualification determination for each prospective juror to either the Chief Judge or the supervising Judge, who in turn shall be responsible for a final ruling upon the qualification of each prospective juror.

7.02 *ACTIONS TO BE TAKEN WHEN THE QUESTIONNAIRE HAS ERRONEOUS, AMBIGUOUS OR OMITTED ANSWERS*

In accordance with 28 U.S.C. § 1865(a), if the Clerk determines that a questionnaire has been returned with erroneous, ambiguous or omitted answers, and that such answers are essential to determining the qualification status of a prospective juror, the Clerk shall return the questionnaire to the prospective juror with instructions to explain, complete or correct the appropriate answer, and to return the questionnaire by mail within ten (10) days.

7.03 *QUALIFICATIONS FOR JURY SERVICE*

In accordance with 28 U.S.C. § 1865(b), the Clerk shall recommend, and the Chief Judge or the Supervising Judge shall find, that every person is qualified for jury service unless that person:

(a) Is not a citizen of the United States eighteen (18) years old who has resided for a period of one year within the Middle District of Florida; or

(b) Is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the questionnaire, or

(c) Is unable to speak the English language, or

(d) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service, or

(e) Has a charge pending against him or her for the commission of, or has been convicted in a State or Federal court of record, of a crime punishable by imprisonment for more than one year, and that his or her civil rights have not been restored.

7.04 *EXEMPTION FROM JURY SERVICE*

In accordance with 28 U.S.C. Section 1863(b)(6), the Court finds that individuals who comprise the following groups of persons or occupational classes shall, in the public interest, be exempted from performing jury service, and that their exemption is not inconsistent with the policies set forth in 28 U.S.C. Sections 1861 and 1862.

(a) Members in active service in the Armed Forces of the United States;

(b) Members of the fire or police departments of any state, district, territory, possession, or subdivision thereof; or

(c) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any state, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of their official duties.

7.05 *PERSONS WHO MAY BE EXCUSED FROM JURY SERVICE*

(a) ***Permanent Excuse Upon Individual Request:*** In accordance with 28 U.S.C. Section 1863(b)(5), the Court finds that service by the following persons or members of the following occupational classes would entail undue hardship or extreme inconvenience to such individuals, and that granting individual requests for permanent excuse from such persons would not be inconsistent with the policies set forth in 28 U.S.C. Sections 1861 and 1862

(1) Persons over 70 years of age; or

(2) Persons having responsibility for providing in-home care and custody of a child or children under the age of ten (10), or

(3) Persons who are essential to the care of aged or infirm persons; or

(4) Persons who have served as a grand or petit juror in a federal court within the past two years; or

(5) Voluntary safety personnel serving a public agency as a non-compensated fire fighter or member of an ambulance or rescue squad.

(b) ***Temporary Excuse Upon Individual Request:*** In accordance with 28 U.S.C. Section 1866(c)(1), the Court, or the clerk under supervision of the Court, may temporarily excuse any qualified juror from jury service. Requests for temporary excuse by individual jurors should ordinarily be presented in writing, and should present a showing of undue hardship or extreme inconvenience.

The name of any juror temporarily excused shall be returned to the qualified jury wheel, unless otherwise ordered by the Court.

CHAPTER EIGHT

ESTABLISHMENT OF QUALIFIED JURY WHEELS

8.01 *QUALIFIED JURY WHEEL DEFINED*

In accordance with 28 U.S.C. Section 1869(g), a "qualified jury wheel" shall mean any device or automated data processing system, into which shall be placed the names of all persons determined to be qualified for jury service pursuant to Chapter Seven of this Plan.

8.02 *ESTABLISHMENT OF DIVISIONAL QUALIFIED JURY WHEELS*

In accordance with 28 U.S.C. Section 1866(a), the Clerk shall establish and maintain a qualified jury wheel for each jury division established pursuant to Section 2.01 of this Plan.

8.03 *EMPTYING AND REFILLING THE QUALIFIED JURY WHEELS*

Unless otherwise ordered by the Court, the Clerk shall empty and refill the qualified jury wheels between January 1, 1989, and October 31, 1989, and every odd year thereafter between January 1 and October 31.

When delays occur between the emptying and refilling of the master and qualified jury wheels, the Court may order that names of qualified jurors presently in the qualified jury wheels be retained and summoned for jury service until the Clerk can complete the operations necessary to refill the qualified jury wheels.

8.04 *PLACING NAMES IN THE QUALIFIED JURY WHEELS*

In accordance with 28 U.S.C. Section 1866(a), the names of all persons determined to be qualified for jury service shall be placed into the appropriate qualified jury wheel.

If a person relocates within the district, that person's name may be transferred to the divisional jury wheel in which they now reside since the statutory residency requirement has not been compromised

CHAPTER NINE

SELECTING AND SUMMONING JURORS FOR JURY SERVICE

9.01 *DRAWING OF NAMES FROM THE QUALIFIED JURY WHEELS*

In accordance with 28 U.S.C. Section 1866(a), the Clerk shall publicly draw at random from the qualified jury wheels the names of as many persons as may be required from time to time for assignment to grand and petit jury panels.

9.02 *SUMMONING JURORS*

The Clerk may issue a summons to each juror in any manner permitted by 28 U.S.C. Section 1866(b).

CHAPTER TEN

SELECTION AND IMPANELMENT OF REGULAR AND SPECIAL JURIES

10.01 *SELECTION AND IMPANELMENT OF GRAND JURIES*

(a) ***Regular Grand Juries***

(1) ***Fort Myers Jury Division:*** In accordance with Fed.R.Cr.P. 6(a), the Court shall order that one or more regular grand juries be publicly drawn at random, and summoned to serve the Fort Myers Jury Division.

(2) ***Jacksonville Jury Division:*** In accordance with Fed.R.Cr.P. 6(a), the Court shall order that one or more regular grand juries be publicly drawn at random, and summoned to serve the Jacksonville Division.

(3) ***Ocala Jury Division:*** In accordance with Fed.R.Cr.P. 6(a), the Court shall order that one or more regular grand juries be publicly drawn at random, and summoned to serve the Ocala Jury Division.

(4) ***Orlando Jury Division:*** In accordance with Fed.R.Cr.P. 6(a), the Court shall order that one or more regular grand juries be publicly drawn at random, and summoned to serve the Orlando Jury Division.

(5) ***Tampa Jury Division:*** In accordance with Fed.R.Cr.P. 6(a), the Court shall order that one or more regular grand juries be publicly drawn at random, and summoned to serve the Tampa Jury Division

(b) ***Special Grand Juries***

(1) ***Authority to Convene:*** In accordance with 18 U.S.C. Section 3331, the Court may order that a special grand jury be empaneled to sit in a particular jury division, however, any such special grand jury shall be empowered to serve throughout the entire district.

(2) ***Selection Procedures:*** Unless otherwise ordered by the Court, when selecting names of jurors to be summoned for a special grand jury venire, the Clerk shall first determine the division in which the special grand jury will be empaneled, and thereafter, shall publicly draw at random a sufficient number of prospective jurors from that division to serve on impanelment day.

(c) ***In Camera Proceedings Relating to Grand Jury Impanelment:*** In accordance with 28 U.S.C. Section 1863(b)(7), and unless otherwise directed by the Court, the actual impanelment of either a regular or special grand jury shall not be held in open Court or within public view.

CHAPTER ELEVEN

DISCLOSURE OF JURY SELECTION RECORDS

11.01 *DISCLOSURE OF JUROR NAMES*

(a) ***Names of Jurors Assigned to Petit Jury Panels:*** In accordance with 28 U.S.C. Section 1863(b)(7), the names of persons assigned to petit jury panels may be disclosed by the Clerk to the parties and to the public at the time, and in the manner provided by the rules of this Court. Provided, however, that the Court may at any time, or from time to time, order generally, or with respect to a particular term or terms of Court, that such names be kept confidential.

(b) ***Names of Jurors Assigned to Grand Jury Panels:*** In accordance with 28 U.S.C. Section 1863(b)(7), the names of jurors selected for either a grand jury venire, or for actual service on a particular grand jury, shall not be disclosed to any person except upon written order of the District Court, and only then upon a showing that exceptional circumstances have created a demonstrated need for disclosure.

11.02 *DISCLOSURE OF INFORMATION AND RECORDS RELATING TO THE JUROR QUALIFICATION AND SELECTION PROCESS*

(a) ***Prior to Emptying and Refilling of the Master Jury Wheel(s):*** In accordance with 28 U.S.C. Section 1867(f), the contents of records and papers used by the Clerk in connection with the juror qualification and selection process shall not be disclosed, except upon written order of the District Court.

(b) ***Subsequent to the Emptying and Refilling of the Master Jury Wheel:*** In accordance with 28 U.S.C. Section 1868, the Clerk shall keep all records and papers relating to the juror qualification and selection process for four years following the emptying and refilling of the master jury wheels, or for such longer period of time as the Court may require.

Upon written request from any person attempting to determine the validity of the selection of any jury, the Court may order the Clerk to make such records available during normal business hours

APPENDIX F

UNITED STATES DISTRICT COURT

		YES	NO
→ TO:	ARE YOUR NAME AND PERMANENT ADDRESS CORRECT? IF "NO" MAKE CORRECTIONS HERE	○	○

PLEASE PROVIDE YOUR PHONE NUMBER(S)

HOME — WORK (INCL. EXTENSION)

AREA CODE NUMBER — AREA CODE NUMBER & EXT

COUNTY YOU NOW LIVE IN

[Questionnaire Marking Instructions Omitted in Printing]

JUROR QUALIFICATION QUESTIONNAIRE

PLEASE READ LETTER ON OTHER SIDE
BEFORE COMPLETING

IF ANOTHER PERSON FILLS OUT THE FORM,
PLEASE INDICATE THE PERSON'S NAME, ADDRESS AND
REASON WHY IN THE REMARKS SECTION

FILL IN COMPLETELY YOUR
RESPONSE TO EACH QUESTION

	YES	NO
1. Are you a citizen of the United States?	○	○
2. Are you 18 years of age or older?	○	○
Date of Birth Give your Age ____ MONTH ____ DAY____ YEAR ____		
3. Has your primary residence for the past year been in this state?	○	○
In the same county?	○	○
If no, show under remarks on reverse the names of other counties or states of primary residence during the last year and show dates.		
4. Do you read, write, speak and understand the English language?	○	○

		YES	NO
If your answer to No. 5, 6, or 7 is "YES" please see notes to questions 5 and 6 on reverse side	5. Are any charges now pending against you for a violation of state or federal law punishable by imprisonment for more than one year?	O	O
	6. Have you ever been convicted either by your guilty or nolo contendere plea or by a Court or Jury Trial, of a State or Federal crime for which punishment could have been more than one year in prison?	O	O
	7. (If "Yes") Were your civil rights restored? (If "Yes", explain on the reverse side)	O	O

	YES	NO
8. Do you have any physical or mental disability that would interfere with or prevent you from serving as a Juror? (If "Yes", please see notes to question 8 on reverse side)	O	O
9. EXEMPTIONS		
Are you employed on a full time basis as a public official of the United States, State, or Local Government who is elected to public office or directly appointed by one elected to office	O	O
Member of any governmental police or regular fire dept (not including volunteer or non-governmental departments)	O	O
Member in active service of the Armed Forces of the United States	O	O

	YES	NO
10. RACE		

Fill in the circle completely which best describes your race. See note on reverse side to assist in ensuring that all people are represented on juries. Please indicate which of the following applies to you. Nothing disclosed will affect your selection for jury service.

○ BLACK ○ ASIAN ○ NATIVE AMERICAN INDIAN

○ WHITE ○ OTHER (SPECIFY) _____

11. Are you Hispanic?	○	○
12. SEX		
MALE ○	FEMALE ○	
13. OCCUPATION (See reverse side)		
Are you now employed?	○	○
Are you a salaried employee of the U.S. Gov't?	○	○

Your usual occupation, trade, or business

_____

Your employer's name

_____

Business or employer's address

_____

	YES	NO
14. EDUCATION		
Show the extent of your education above grade school		
high school/GED equivalent	○	○
trade/vocational school	○	○
above high school	○	○

15. GROUNDS FOR REQUESTING EXCUSE

This section describes categories of persons who may be excused from service as a juror. If you are a person in one of these categories and you wish to be excused, fill in completely the circle for the number of your category here →→→→

Social Security Number ____-___-____

Date_____

If your address changes after you have returned the questionnaire please notify the court promptly by letter or post card addressing it to "attention: Jury Administrator."

[Reverse Side of Card Omitted in Printing]

Supreme Court, U.S.
FILED
JAN 11 2006
OFFICE OF THE CLERK

No. 05-461

In the Supreme Court of the United States

WYATT HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

Whether the exemption of state and local law enforcement officers from jury service under the Jury Selection and Service Act of 1968, 28 U.S.C. 1863(b)(6), or the slightly broader exception adopted by the district court, which exempts federal and private law enforcement officers as well, violated petitioner's Sixth Amendment right to a jury drawn from a fair cross-section of the community, when the excluded group constitutes only 0.55% of the eligible juror pool.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 409 F.3d 1293. The opinion of the district court (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2005. A petition for rehearing was denied on July 15, 2005 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on October 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of deprivation of rights (use of excessive force) under color of law, in violation of 18 U.S.C. 242; obstruc-

tion of justice (submitting a misleading or incomplete police report), in violation of 18 U.S.C. 1512(b)(3) (2000 & Supp. II 2002); and making false statements to an agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001. He was sentenced to imprisonment for a term of 87 months. The court of appeals affirmed.

1. The Jury Selection and Service Act of 1968 (the Act), 28 U.S.C. 1861 *et seq.*, requires each United States district court to "devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of [the Act]." 28 U.S.C. 1863(a). The Act requires that each district court's plan shall bar from jury service three categories of individuals: members of the armed services in active service; "members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession"; and public officers. 28 U.S.C. 1863(b)(6). Pursuant to this statutory directive, the United States District Court for the Middle District of Florida provided in its Plan for the Qualification and Random Selection of Grand and Petit Jurors (Jury Plan) (Pet. App. 54a-73a) that each of the three groups identified in 28 U.S.C. 1863(b)(6) is exempt from jury service. Pet. App. 67a. The district court's Juror Qualification Questionnaire (*id.* at 74a-80a) includes questions designed to discover whether a prospective juror is exempt, including a question whether the individual is a "[m]ember of any governmental police or regular fire dep[artmen]t." *Id.* at 77a. Under the district court's practice, any individual who has arrest powers, including federal law enforcement officers and part-time and pri-

vate law enforcement officers, is considered to be covered by the exemption. *Id.* at 37a.

2. The criminal charges against petitioner arose from his apprehension and arrest of Christopher Grant while petitioner was a corporal with the Charlotte County, Florida, Sheriff's Department. Pet. App. 2a. Grant was targeted by the Department's Vice and Organized Crime Component (VOCC) for selling marijuana. *Ibid.* After Grant fled from VOCC officers attempting to arrest him as part of an undercover sting operation, petitioner pursued Grant's minivan and pulled it over to the side of the road. *Ibid.* Petitioner "pointed his service weapon at Grant and ordered him out of his car and onto his knees." *Ibid.* "Grant testified that he complied, exiting the car and kneeling on the ground with his hands on his head." *Ibid.*

Another officer who arrived at the scene, Detective Keith Bennett, testified that petitioner "approached Grant with his gun in his right hand, placed a knee on Grant's back and using his substantial weight advantage, 'rode him to the ground.'" Pet. App. 3a. Grant testified that subsequent to the takedown, petitioner struck him forcefully in the jaw with a "black object." *Id.* at 3a. Detective Bennett corroborated Grant's testimony, stating that "once Grant was prone and offering no resistance, he saw [petitioner's] gun arm move to strike Grant." *Ibid.*

After the incident, according to police witnesses, petitioner made incriminating statements indicating that he had struck Grant with his pistol. Pet. App. 3a. Detectives Bennett and Jack Collins further testified that petitioner instructed subordinate VOCC officers "not to include details of the arrest in their own police reports," and that petitioner told Bennett to deny that petitioner

had struck Grant. *Id.* at 3a-4a. Petitioner's own police report stated that "no force" had been used in the arrest and omitted any mention of striking Grant. *Id.* at 4a. "In a subsequent interview with an FBI agent investigating Grant's allegations of excessive force, [petitioner] represented that he had thrown his gun into his car before approaching Grant." *Ibid.*

3. Before trial, petitioner filed a motion to dismiss the indictment in which he challenged the jury selection process. Petitioner's motion argued, *inter alia*, that the Middle District of Florida's Jury Plan, and its practices, violated his Sixth Amendment right to a jury composed of a fair cross-section of the community by excluding law enforcement officers from the pool from which the jury would be chosen.

The district court denied petitioner's motion. Pet. App. 33a-45a. The court first found that, even assuming that petitioner had established a *prima facie* case that the jury selection process did not produce a fair cross-section of the community because the court systematically excluded a distinctive group composed of law enforcement officers, the government had sufficiently rebutted petitioner's case by demonstrating the "significant state interest" of "keeping state and federal law enforcement officers on the street." *Id.* at 40a-41a. On this particular point, the district court found "instructive" prior circuit precedent holding that exempting police officers "from jury service because it is good for the community that they not be interrupted in their work does not violate the United States Constitution." *Ibid.* (quoting *United States* v. *Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995), cert. denied, 516 U.S. 1060 (1996) (internal citations omitted)). Following this precedent, the district court concluded that "allowing state and federal

law enforcement officers and/or safety personnel, whether full or part-time, to perform their duties without interruption of jury services benefits the community" and presents "no violation of [petitioner's] Sixth Amendment rights." *Ibid.*

4. The court of appeals affirmed the district court's denial of petitioner's Sixth Amendment claim. Pet. App. 19a-22a.[1] The court recited the three-step analysis of *Duren* v. *Missouri*, 439 U.S. 357 (1979), and applied the *Duren* test for rebutting a *prima facie* case. The court agreed with the district court that the exemption at issue in this case passed constitutional muster under the circuit's earlier decision in *Terry*, even assuming that petitioner could show a *prima facie* Sixth Amendment violation, as it "does not reach much further than the exemption in *Terry*." Pet. App. 21a. In relevant part, the court of appeals observed that "federal, part-time, and private law enforcement officers"—the officers not covered by the exemption set forth in 28 U.S.C. 1863(b)(6) that the *Terry* court upheld—"would only compose a fraction" of the total number of law enforcement officers. Pet. App. 21a. Because law enforcement officers constitute only 0.55% of the eligible juror pool in the relevant area by petitioner's estimate, the court of appeals reasoned that "[i]t thus 'may be fairly said that the jury lists or panels are representative of the community.'" *Ibid.* (quoting *Duren*, 439 U.S. at 367 (internal citation omitted)). Moreover, even the slightly broader exemption for federal, part-time, and private law enforcement officers "manifestly and primarily" advances the significant interest of "allowing police officers to

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[1] The court of appeals vacated petitioner's sentence because of an error that is not relevant to this petition. See Pet. App. 24a-26a.

perform their duties without the interruption of jury service." *Ibid.*

Finally, the court of appeals rejected petitioner's argument that the district court's plan violated the Jury Selection and Service Act. Noting that a mere "technical violation" of the Act does not warrant relief, Pet. App. 21a, the court concluded that "[s]ince [petitioner's] figures state that law enforcement officers as a whole compose only 0.55% of the population in the division, the additional sweep of the Jury Plan in this case excludes, on average, less than one juror per 23-person [grand jury] panel," which is not "a significant enough impact * * * to violate the Act." *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 7-9) that the court of appeals' decision upholding the constitutionality of the Jury Selection and Service Act as applied by the Middle District of Florida "directly contravene[s]" this Court's precedents on the fair-cross-section requirement of the Sixth Amendment. He also asserts (Pet. 10-13) that the policy of excluding police officers from juries is not justified in today's society. The court of appeals' decision conforms to this Court's precedents and does not conflict with a decision of any other circuit. Indeed, no other court of appeals has addressed the issue presented. This case does not present a legal issue warranting review by this Court.

1. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. The Court has interpreted this pro-

vision to require that jury venires be composed of a fair cross-section of the community. See *Holland* v. *Illinois*, 493 U.S. 474, 480 (1990); *Duren* v. *Missouri*, 439 U.S. 357, 363-364 (1979); *Taylor* v. *Louisiana*, 419 U.S. 522, 526-531 (1975).

In *Duren*, this Court held that "[i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." 439 U.S. at 364. Even if a defendant establishes a *prima facie* case, the government may rebut that *prima facie* case by showing that the challenged exclusion serves "a significant [government] interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-368.

Petitioner asserts (Pet. 8) that the Jury Selection and Service Act's exclusion of law enforcement officers from jury service, "as implemented and expanded upon" by the Middle District of Florida, is "expressly" prohibited by this Court's decisions in *Duren* and *Taylor*. In fact, far from expressly prohibiting the exemption at issue in this case, those cases recognize the constitutionality of reasonable exemptions of occupational groups —like the one at issue in this case—that meet community needs. *Taylor* stated that "[t]he States are free to grant exemptions from jury service to * * * those engaged in particular occupations the uninterrupted per-